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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 351

McKINLEY DURHAM, LUCIOUS PATTERSON, SR.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

B. CLARENCE MAYFIELD
910 West Broad Street
Savannah, Georgia 31401
Attorney for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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McKinley Durham, and Lucious Patterson, Sr., respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court for the Fifth Circuit, entered in the above styled case on June 17, 1969, affirming the petitioners' convictions.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit in this case is attached hereto as appendix "A".

JURISDICTION

The judgment of the Circuit Court for the Fifth Circuit was entered on June 17, 1969

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 2101 (f).

QUESTIONS PRESENTED

I

Whether Appellants were denied their rights to a speedy trial in violation of the Constitution of the United States.

II

Whether the federal officers used unlawful entrapment to effect and sustain prosecution of Lucious Patterson, Sr., and McKinley Durham.

STATEMENT OF THE FACTS

Robert E. Griffith of the Alcohol and Tobacco Divisions, of the U. S. Treasury Department in October, 1966 (R. 28), employed an informer Joe Hayes, Jr., at ten (10) dollars per day and a reward at the end of the investigation (R. 37) to help them catch two suspected violators that they were "not able to get off the ground on", in investigating (R. 37).

The two such persons were the Appellants: Griffith directed the informer to get information on them (R. 48); he "pointed him in that direction, asked him (Hayes) if he could approach them about buying whiskey" (R. 48).

With the informer in contact and the officers hiding in the trunk of the automobile, observing the entire transaction through a rear light which had been removed, three purchases were made (R. 1, 3, 5).

On January 17, 1967 (R. 47), some 47 days after the first purchase and sale appellants were arrested and charged with violations of 26 U.S.C.A. 5205 (a) (2), 5604 (a).

Appellants were indicted on July 25, 1967, Two hundred and five (205) days after their arrest.

On October 26, 1967, ninety (90) days later Appellants' motion to dismiss the indictment (R. 6) based on the Sixth Amendment for lack of prosecution, the trial judge overruled and denied Appellants' motion. On October 16, 1968, 365 days after the motion was made (R. 9); on October 26, 1967 (R. 9), Appellants filed a Demand for Trial, stating that appellants had been under arrest since January, 1967, ten months without trial. The Court granted this motion on October 16, 1968, a year after the Motion was made and set trial for October 21, 1968, at which time Appellants were tried and convicted.

REASON FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals in its opinion of June 17, 1969, held that petitioners failed to show substantial prejudice to their defense thus depriving themselves of the benefit of the constitutional relief provided by the Sixth Amendment to the Constitution of the United States.

Petitioners, however, submit that a showing of prejudice was well documented by citational reference to *U. S. v. McWilliams,* 163 F. 2d 695, which stated and set out the

attending prejudices inherent in failure to grant a speedy trial to a defendant. Petitioners further alleged that long delay in case being brought to trial, assumption that unreasonable delays were by their nature prejudicial may be considered along with other circumstances. *Dockery* v. *U. S.*, 393 F. 2d 352. Likewise in *Hedgepeth* v. *United States*, 365 F. 2d 952 (1966), the Court stated emphatically that unreasonable delays are by their nature prejudicial.

Defendants were sorely oppressed by the long delay and such delays are prohibited by the Sixth Amendment. *United States* v. *Ewell*, 383 U. S. 116.

The Court erroneously computed the relevant time period at which the right to a speedy trial existed in this case based upon the surrounding facts and circumstances. In *Smith* v. *U. S.*, 79 S. Ct. 991, 360 U. S. 1, 3 L. Ed. 2d 1041 (1959), the Court declared that "if, contrary to sound judicial administration in our federal system *arrest* and *incarceration*, are followed by inordinate delay prior to indictment a defendant may under appropriate circumstances invoke the protection of the Sixth Amendment". The Court then should have considered the entire period from defendants' arrest up to trial of the defendants. In *Lucas* v. *U. S.*, 363 F. 2d 500, the Court espoused the rule that the right to a speedy trial attaches from the time charges are formally lodged reason of a Complaint, information, or indictment.

In *Williamson* v. *United States*, 311 F. 2d 441 (1962), the Court prohibited specificity in efforts to arrest and convict specific suspects, stating that this results in entrapment in the instant case the record shows that defendants were sought out and coerced into making a sale, when no previous inclination to do the same was in the minds of the defendants. The purpose to entrap and arrest germinated

in the minds of the officers before the defendants were ever put under surveillance. The record shows that a specific request was made to try and get Patterson and Durham. Based on such facts and evidence fundamental fairness was denied these defendants.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

B. CLARENCE MAYFIELD
Attorney for Petitioners

910 West Broad Street
Savannah, Georgia 31401

CERTIFICATE OF SERVICE

I, B. CLARENCE MAYFIELD, hereby certify that I have served a copy of the within and foregoing Petition for a Writ of Certiorari for Petitioners upon Mr. Floyd M. Buford, United States Attorney, Middle District of Georgia, Post Office Box U, Macon, Georgia 31303, by mailing a copy of the same to him by United States Mail, postage prepaid, addressed as indicated above.

This 16th day of July, 1969.

B. CLARENCE MAYFIELD
Attorney for Petitioners

910 West Broad Street
Savannah, Georgia 31401